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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/826,280

04/19/2004

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EXAMINER

PATEL, HARESH N

ART UNIT

PAPER NUMBER

2454

MAIL DATE

DELIVERY MODE

08/21/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/826,280	Applicant(s) BELOUSSOV ET AL.	
	Examiner HARESH N. PATEL	Art Unit 2454	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 06 August 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: _____.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.

/HARESH N PATEL/
 Primary Examiner, Art Unit 2454

Continuation of 11. does NOT place the application in condition for allowance because: the cited prior arts still render the claims unpatentable and the final rejection is deemed proper.

Note: Prior to the applicant's submission of the after final response dated 8/6/2009, the applicant called the examiner on 8/5/2009 regarding the final office action dated 7/20/2009 and discussed about 37 CFR 1.131 and the effective priority dates of the Leonard, Price references, please see the interview summary dated 8/10/2009. However, the applicant did not mention about the applicant's initiated discussion in the after final response dated 8/6/2009.

Regarding the applicant's concern in reference to deligence, i.e., "... Applicants need to show that "something" was done on the application virtually every day between January 20 and April 19, 2004.", "Applicants again emphasize that there is no requirement in the law that every single day be accounted for.", etc., is noted.

However, the applicant failed to account each of the gaps. The applicant's mentioning of mere general statements for all gaps together does not justify delay during each individual gap. The applicant failed to provide specific reasons for each individual gap between January 20, 2004 and April 19, 2004, a duration of about three months! Contrary to the applicant's concern, each of the gaps or indeed more than "every single day" or "every day". The fact is that the applicant is relying on date December 30, 2003 under 35 CRF 1.131. And, for deligence between January 20, 2004 and April 19, 2004, it not a matter of few days or few weeks but months! - about two-three months! and the dates which the applicant has came up with (under exhibits B and C) is merely show 13 days of e-mail communication etc. Hence, the final office action dated 7/20/2009 required further evidence from the applicant, and the applicant did not provide any further evidence for the deligence in the after final response dated 8/6/2009. The applicant has provided mere general statements, i.e., regarding day to day life, etc., which applies to almost each and every applicant and considering the applicant provided statements all applicant would attempt to overcome prior arts using similar day to day life style related statements. Each of the individual gaps indeed require specific reasons for justifying the delay. For example, an applicant being hospitalized or away for similar need, etc., rather day to day activity as an excuse.

The applicant failed to cite in the MPEP/ case law that the seven days gap and multiple gaps that total at least two months is not a concern for the deligence. The applicant did not account each of the gaps between the 13 days, which are indeed not "every single day" and rather couple months. During the gaps the applicant did nothing. Applicant assertion that the "unaccounted-for time" is far too short is contrary to the fact that the gaps in total is indeed more than two months.

As per the prosecution history, please see that the applicant had not filed either a provisional application or a non-provisional application prior to the April 19, 2004, which would have otherwise demonstrated that the applicant indeed had possession of the claimed subject matter, and in fact has submitted the 35 CFR 1.131 to overcome the rejections that were made, i.e., 1) Leonard-Sun-Microsystems et al. 7,188,120 (Hereinafter Leonard-Sun-Microsystems), filed January 20, 2004, effective priority dated May 9, 2003; and 2) Prince-Sun-Microsystems et al. 7,337,455 (Hereinafter Prince-Sun-Microsystems), filed January 28, 2004, effective priority dated May 9, 2003.

Regarding the applicant's mentioning of, the Diligence is reduction to practice that is required only between the filing date of Leonard (January 20, 2004) and the filing date of the present application - April 19, 2004; for clarification the effective priority date of Prince-Sun-Microsystems and Leonard-Sun-Microsystems is indeed May 9, 2003, which is what the provisional application of Prince-Sun-Microsystems and Leonard-Sun-Microsystems represents and which was also provided to the applicant.

It is noted that the applicant provided diagrams does not even contain any date, etc., to overcome the filling dates of the Leonard-Sun-Microsystems and Prince-Sun-Microsystems and at the same time argues that the priority document dated May 9, 2003 of the Leonard-Sun-Microsystems and Prince-Sun-Microsystems should not be considered as it does not contain the claimed limitations.

Note: The undated diagrams have been made part of the remarks dated 8/6/2009, which demonstrates that the diagrams can be made part of any documents or as an attachment, as the diagrams does not contain any dates, etc. Please see the remarks dated 8/6/2009 in which the diagrams do not contain any dates.

The after final response dated 8/6/2009 did not respond to statements, "Further exhibits A2-A4 neither contain dates on the exhibits i.e. diagram pages nor mention "scheme1.pdf" or "scheme3.pdf" on the exhibits A2-A4", which was specifically pointed out in the final office action dated 7/20/2009.

- the exhibit A1 is an e-mail mentioning about scheme1.pdf and scheme3.pdf attachments.

However, exhibits A2-A4 do not have any date or any reference indicating that they are indeed scheme1.pdf and scheme3.pdf attachments of the e-mail of A1.

- Exhibit A1 does contain date December 30, 2003 but does not show any of the claimed subject matter elements.

- Exhibit A1 itself (which contain dated December 30, 2003) does not mention anything regarding this case and is a mere e-mail, which can be for another case or a different purpose. As the applicant mentioned Alex Tormasov has been a busy person and this e-mail can be for another cases or a different purpose as the e-mail under Exhibit A1 does not contain any reference to this application under prosecution.

- Exhibits A2, A3, A4, A6, etc. different documents, do not contain any dates, etc., indicating that they were indeed prior to the concerned priority date.

- The response did not provide any further evidence, i.e., dates, etc., regarding the Exhibits A2, A3, A4, A6 which are being different documents and which did not contain any dates.

The after final response dated 8/6/2009 also did not respond to

statements, "Exhibits under B and C clearly show that the work that

was done and mentioned in the Exhibits B and C (i.e., dated after the concerned date of the cited references used for the rejections) has been missing in the Exhibits A1-A6".

- The Exhibits B1-B10 and C1-C4 indeed show that the applicant did not had possession of the matter at the time of A1, etc., that is presented under B1-B10 & C1-C4, as the applicant is relying on dates of A1 etc., versus the exhibits under B and C that are after the concerned priority date.

The applicant's statement, "Applicants also respectfully point out that it is sufficient to show conception of only one claim (e.g., claim 1).", is noted. However, the applicant failed to cite in the MPEP / case law about this requirement that would indeed ignore all other claimed limitations.

Regarding the applicant's concern, Leonard discusses two types of "zones"- a "global zone" and "non-global zone." A global zone, somewhat simplistically, is the operating system and processes that run under that operating system with system privileges. A global zone has an administrator (in conventional terms, the computer's administrator, or someone who has system or root privileges). Non-global zones are virtual environments, which are isolated from each other. This is generally discussed in columns 3-5 of Leonard; TechOne, as best as can be determined, is a customer of SWsoft (the assignee of this application). The Virtual Private Servers discussed in the document are (again, as best as can be determined) software products sold by SWsoft; the examiner respectfully disagrees. The relied upon disclosure and the teachings of the Leonard-Sun-Microsystems, Prince-Sun-Microsystems, TechOne-Hosting are not limited as concluded by the applicant. Leonard-Sun-Microsystems, Prince-Sun-Microsystems, TechOne-Hosting discloses the broadly claimed limitations, i.e., please see the cited portions among other places of the cited art that not only contain the applicant concerned content of the art but also the relied upon limitations. The specification of the application under prosecution at page 20, states, [0067] Having thus described a preferred embodiment of a system and method, it should be apparent to those skilled in the art that certain advantages of the described method and apparatus have been achieved. It should also be appreciated that various modifications, adaptations, and alternative embodiments thereof may be made within the scope and spirit of the present invention. The invention is further defined by the following claims. Further, when reviewing a reference the applicants should remember that not only the specific teachings of a reference but also reasonable inferences which the artisan would have logically drawn therefrom may be properly evaluated in formulating a rejection. In re Preda, 401 F. 2d 825, 159 USPQ 342 (CCPA 1968) and In re Shepard, 319 F. 2d 194, 138 USPQ 148 (CCPA 1963). Skill in the art is presumed. In re Sovish, 769 F. 2d 738, 226 USPQ 771 (Fed. Cir. 1985). Every reference relies to some extent on knowledge of persons skilled in the art to complement that which is disclosed therein. In re Bode, 550 F. 2d 656, 193 USPQ 12 (CCPA 1977).

Again, as per the prosecution history, the applicant had not filed either a provisional application or a non-provisional application prior to the April 19, 2004 (after the exhibit A1 dated December 30, 2003) and has submitted the 35 CFR 1.131 to overcome the rejections that has been made, i.e., 1) Leonard-Sun-Microsystems et al. 7,188,120 (Hereinafter Leonard-Sun-Microsystems), filed January 20, 2004, effective priority dated May 9, 2003; and 2) Prince-Sun-Microsystems et al. 7,337,455 (Hereinafter Prince-Sun-Microsystems), filed January 28, 2004, effective priority dated May 9, 2003.

Since, the applicant failed to account individually each of the gaps for the deligence between January 20, 2004 and April 19, 2004 and the applicant's mentioning of mere general statements for all gaps together does not justify delay during each individual gap; The applicant failed to provide specific reasons for each individual gap between January 20, 2004 and April 19, 2004, a duration of about three months!; contrary to the applicant's assertion, each of the gaps or indeed more than "every single day" or "every day"; the final office action dated 7/20/2009 required further evidence from the applicant, and the applicant did not provide any further evidence for the deligence in the after final response dated 8/6/2009; the after final response do not overcome the effective priority date of Prince-Sun-Microsystems and Leonard-Sun-Microsystems.

For further clarification the effective priority date of Prince-Sun-Microsystems and Leonard-Sun-Microsystems is indeed May 9, 2003, which is what the provisional application of Prince-Sun-Microsystems and Leonard-Sun-Microsystems represents and which was provided to the applicant and cannot be ignored based on the mere remarks and provided exhibits of the applicant.

Considering the applicant's concerns regarding the Leonard-Sun-Microsystems and Prince-Sun-Microsystems, in order to compact the prosecution of the case, MPEP 1201 states: Where the differences of opinion concern the denial of patent claims because of prior art or other patentability issues, the questions thereby raised are said to relate to the merits, and appeal procedure within the Office and to the courts has long been provided by statute (35 USC 143). 35 U.S.C. 134 (a) states: An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Board of Patent Appeals and Interferences, having once paid the fee for such appeal.